



## Health Matrix: The Journal of Law-Medicine

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Volume 16 | Issue 1

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2006

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### Recommended Citation

Kari J. Carter, *The Best Interest Test and Child Custody: Why Transgender Should Not Be a Factor in Custody Determinations*, 16 Health Matrix 209 (2006)

Available at: <https://scholarlycommons.law.case.edu/healthmatrix/vol16/iss1/10>

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## NOTE

# THE BEST INTEREST TEST AND CHILD CUSTODY: WHY TRANSGENDER SHOULD NOT BE A FACTOR IN CUSTODY DETERMINATIONS

Kari J. Carter<sup>†</sup>

*My mother's not happy in the body she is in. My mom is a lot happier since starting to live as who she wants to be. When I was 13, my mother said, 'I want to be a man, do you care?' I said, 'No. As long as you are the same person inside and still love me. I don't care what you are on the outside.' It's like a chocolate bar, it's got a new wrapper but it's the same chocolate inside.<sup>1</sup>*

- 14-year old daughter of a female-to-male transsexual parent.

## INTRODUCTION

Every day in the United States a judge determines whether it is in the best interests of a child to award custody to a divorcing mother or father. In applying this standard, courts consider a number of factors, including, *inter alia*, the physical, mental, emotional and social needs of the child; the parent's ability and desire to meet those needs; and the moral fitness of the parent.<sup>2</sup> The breadth of the best interests of the

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<sup>1</sup> Richard Green, *Transsexuals' Children*, 2 INT'L J. TRANSGENDERISM 4 (1998), available at <http://www.symposium.com/ijt/ijtc0601.htm>.

<sup>2</sup> Jovanna Vujovic, Note, *Child Custody and Visitation*, 5 GEO. J. GENDER & L. 477, 482-85 (2004) (discussing the evolution of child custody laws to reflect

child test allows judges wide discretion in their decision-making.<sup>3</sup> This discretion allows a judge to consider factors that may negatively impact a child's life.<sup>4</sup> However, courts have identified factors such as parent's race and religion as being outside the court's analysis; thus, considering them non-factors in child custody decisions.<sup>5</sup>

Recently courts have addressed whether a parent's sexual orientation should be used when determining the custodial placement of a child. Case analysis reveals that the judicial system is currently split on how to treat a parent's sexual preference in relation to custody determinations; some courts only consider homosexuality if it negatively impacts the child, other courts view a gay parent as a per se ban on custody.<sup>6</sup> Related to the confusion is the issue of how a court should treat a parent who identifies with the gender opposite to that which he was born.

This Note argues that a person's gender identity is a factor that should not be considered in child custody decisions unless there is evidence of a likely negative impact on the best interests of the child. Part I reviews *Kantaros v. Kantaras*, an instructive child custody case awarding custody to a female-to-male transgender who played the role of the children's father for nine years prior to the custody hearing. Part II provides a brief overview of child custody decisions and describes the best interests of the child standard. Part III supplies a definition of transgender. Further, it reviews the history of transgenders and child custody, illustrating how courts have traditionally treated this factor. Part III also explores the scientific data associated with the impact of transgender parents on their children. Part IV discusses the use of personal characteristics like race, religion, and sexual orientation as factors for determining child custody decisions under the guise of the best interests of the child standard. Part V argues that courts

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changes in society's position regarding marriage, family and gender).

<sup>3</sup> Nan D. Hunter, *Federal Courts, State Courts and Civil Rights: Judicial Power and Politics*, 92 GEO. L.J. 941, 964 (2004) (book review).

<sup>4</sup> See Daniel A. Krauss et al., *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCHOL. PUB. POL'Y. & L. 843, 843-44 (2000).

<sup>5</sup> See *Ficker v. Ficker*, 62 S.W.3d 496, 499 (Mo. Ct. App. 2001) (ruling that "favoring or tending to favor one religious persuasion over another in a child custody dispute [is] intolerable to our system of law."). See also *Holt v. Chenault*, 722 S.W.2d 897, 899 (Ky. 1987) (refusing to consider the mother's subsequent biracial marriage as a reason to modify a custody decree).

<sup>6</sup> Elizabeth Erin Bosquet, *Contextualizing and Analyzing Alabama's Approach to Gay and Lesbian Custody Rights*, 51 ALA. L. REV. 1625, 1627 (2000) (proposing that denial of custody because of a parent's homosexuality, without other considerations, does not promote what is in the best interests of the child).

should not consider a parent's gender dysphoria unless it is likely that the child may suffer negative harm because of the parent's transgenderism. This section proposes that gender dysphoria is an immutable characteristic present in today's families. It further predicts that social science data is the key to facilitating legal acceptance of this approach. This Note concludes with the idea that courts must approach families involving transgender parents by considering what is truly in the best interests of the child, the same way they currently approach non-transgender families.

## I. THE KANTARAS DECISION—AN ILLUSTRATIVE CASE

In 2003, a custody case of first impression in Florida decided whether a transgender has the right to marry and be a parent.<sup>7</sup> After weighing the evidence for a year, a Florida Circuit Court judge determined that though born a woman, a transgender's marriage to a woman was legally valid and that it was in the best interests of two children to remain in the parental custody of the transgender father.<sup>8</sup> This decision was carried on Court TV and was accompanied by an 800-page opinion, which provided an in-depth analysis of the science behind transgenders.<sup>9</sup>

Michael Kantaras was born female but completed sex-reassignment in 1987.<sup>10</sup> In 1988, Michael and Linda Forsythe met at work and became friends.<sup>11</sup> During this time both Michael and Linda were dating other people.<sup>12</sup> However, Michael and Linda were also intimate and Linda became aware of Michael's gender reassignment.<sup>13</sup> Linda became pregnant as a result of her other relationship, but the father of the baby moved away.<sup>14</sup> During the pregnancy Michael emotionally supported Linda and was present at the birth of her son, Mat-

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<sup>7</sup> *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004) (leaving the child custody decision to be considered upon remand).

<sup>8</sup> *Kantaras v. Kantaras*, No. 98-5375CA, at 808-09 (Fla. Cir. Ct. Feb. 21, 2003), available at <http://www.court tv.com/archive/trials/kantaras/docs/opinion.pdf>.

<sup>9</sup> *Id.* at 14, 519-25, 729-73. This opinion has been criticized for its focus on gender identity rather than positive parental qualities. See Elizabeth C. Barcena, *Kantaras v. Kantaras: How a Victory for One Transsexual May Hinder the Sexual Minority Movement*, 12 BUFF. WOMEN'S L.J. 101, 102 (2004).

<sup>10</sup> *Kantaras v. Kantaras*, No. 98-5375CA, at 17 (Fla. Cir. Ct. Feb. 21, 2003), available at <http://www.court tv.com/archive/trials/kantaras/docs/opinion.pdf>.

<sup>11</sup> *Id.* at 15.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 16.

<sup>14</sup> *Id.* at 15.

thew.<sup>15</sup> Shortly after Matthew's birth, Michael began living with Linda and Matthew.<sup>16</sup> Six weeks after Matthew was born, Michael and Linda were married.<sup>17</sup> Shortly thereafter, Michael legally adopted Matthew.<sup>18</sup> In 1991, Linda was artificially inseminated with sperm from Michael's brother and she became pregnant.<sup>19</sup> Their daughter, Irina, was born in 1992.<sup>20</sup>

During their nine-year marriage, Michael and Linda raised the two children together.<sup>21</sup> At the time of the divorce and custody decision the children were eleven and fourteen years old.<sup>22</sup> Linda was aware that Michael was a transgender before she married him.<sup>23</sup> During the divorce proceeding Linda decided that she was not comfortable with Michael's transgender identity and asked the court to invalidate the marriage and deny Michael any parental rights, solely because he was a transgender.<sup>24</sup>

In making the custody decision, the court relied heavily on the testimony and findings of a court-appointed psychologist and an independent court-appointed therapist who evaluated the Kantaras family to determine the best interests of the children.<sup>25</sup> Although the psychologist did not personally interview any of the Kantaras family, when asked whether sex reassignment surgery has a negative impact on a transgender's ability to be a parent, the psychologist responded that the surgery has no impact on parenting abilities.<sup>26</sup> The psychologist further stated that he would have no concern if "a court award[ed] custody to a transsexual man who has completed the sex reassignment process . . . if he's a good parent. . . ."<sup>27</sup>

After interviewing the family, the therapist considered the following ten factors to determine which parent, Michael or Linda, bettered the interests of the Kantaras children:

- 1) The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent . . . [:]

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<sup>15</sup> *Id.* at 15-16.

<sup>16</sup> *Id.* at 17.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 18.

<sup>19</sup> *Id.* at 19.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 13, 18.

<sup>22</sup> *Id.* at 15-16.

<sup>23</sup> *Id.* at 16.

<sup>24</sup> *See id.* at 6.

<sup>25</sup> *Id.* at 777, 790.

<sup>26</sup> *Id.* at 294.

<sup>27</sup> *Id.*

- 2) The love, affection and other emotional ties existing between the parents and the child . . . [;]
- 3) The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care, and other material needs . . . [;]
- 4) The length of time the child has lived in a stable, satisfactory, environment and the desirability of maintaining continuity . . . [;]
- 5) The permanence, as a family unit, of the existing or proposed custodial home;
- 6) The moral fitness of the parents . . . [;]
- 7) The mental and physical health of the parents . . . [;]
- 8) The home, school, and community record of the child . . . [;]
- 9) The reasonable preference of the child, if the [c]ourt deems the child to be of sufficient intelligence, understanding and experience to express a preference . . . [;] [and]
- 10) The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the children and the other parent.<sup>28</sup>

In response to the factor concerning the moral fitness of the parents, the therapist stated, "neither parent presents as 'immoral' in the sense of drug or alcohol abuse, criminal record, child physical or sexual abuse, or *sexual misconduct*."<sup>29</sup> In fact, nowhere in the therapist's best interests analysis is Michael's transgender mentioned.<sup>30</sup>

After studying the family, the therapist determined that Michael was the better parent; Michael scored higher than Linda on nine of the ten child custody considerations identified above.<sup>31</sup> Michael was found to have superior parenting skills and mental stability, while the court noted expert testimony from a series of court-appointed counselors suggesting that Linda suffered from a borderline personality disorder.<sup>32</sup> The therapist also testified that Linda Kantaras had tried to turn the children against Michael.<sup>33</sup> In the section assessing the preference of the children, the court stated, "The legal consequences of in-

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<sup>28</sup> *Id.* at 785-89.

<sup>29</sup> *Id.* at 786 (emphasis added).

<sup>30</sup> *Id.* at 785-89.

<sup>31</sup> *Id.* at 422, 790.

<sup>32</sup> *Id.* at 790.

<sup>33</sup> *Id.* at 789-90.

terpreting the statutory law of marriage should not result in the destruction of these two bright and lovely children.”<sup>34</sup>

On February 23, 2003, the Florida Circuit Court granted the Kantaras’ a divorce.<sup>35</sup> The court also determined that it was in the best interests of the children to remain in the parental custody of Michael.<sup>36</sup>

However, on July 23, 2004, the Second District Court of Appeal of Florida found the marriage between Michael and Linda Kantaras *void ab initio* because Michael was not a “male” when the marriage occurred and the marriage between same-sex couples is not recognized in the state of Florida.<sup>37</sup> The court did not reverse the custody determination of the prior decision but left this issue for examination upon remand.<sup>38</sup>

## II. CUSTODY DETERMINATIONS & THE BEST INTERESTS STANDARD

Child custody claims lie within state jurisdiction and such disputes regularly appear in state and local courts.<sup>39</sup> When addressing child custody claims, the court system makes a presumption that children, unlike adults, are unable to determine and safeguard their own interests.<sup>40</sup> As a result, child placement laws are intended to ensure that children are provided an environment that sufficiently serves their needs.<sup>41</sup> Child custody decisions are typically not reviewable and are not overturned unless the trial court commits gross and palpable er-

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<sup>34</sup> *Id.* at 789.

<sup>35</sup> *Id.* at 791.

<sup>36</sup> *Id.* at 799. For more details on this case, see Barcena, *supra* note 9.

<sup>37</sup> Kantaras v. Kantaras, 2004 Fla. App. LEXIS 10997, at \*19 (Fla. Ct. App. 2004); See also Chris Tisch, *Transsexual Again Argues for Custody*, ST. PETERSBURG TIMES (Fla.), Jan. 22, 2005, at 3B (giving an overview of the Kantaras’s latest appearance in court and stating that the appeals court ruled that “gender is established at birth and a change in that gender cannot be legally recognized.”).

<sup>38</sup> Kantaras, 2004 Fla. App. LEXIS 10997, at \*19-20. See also Tisch, *supra* note 37, at 3B (stating that the legal arguments have been completed and the child custody determination now lies in the hands of Judge O’Brien, the same judge that heard the original Kantaras case).

<sup>39</sup> See David Rayside, *Family Law and Policy*, in 1 ENCYCLOPEDIA OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER HISTORY IN AMERICA 367, 368 (Marc Stein ed., 2004).

<sup>40</sup> JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 5 (1996).

<sup>41</sup> *Id.*

ror.<sup>42</sup> Such an unpredictable decision setting provides extraordinary risks for a transgender parent.<sup>43</sup>

In cases where the dissolving marriage consists of a natural and non-natural parent, many states make a presumption in favor of the natural parent.<sup>44</sup> This presumption is made even when the non-natural parent has functioned as a parent.<sup>45</sup> Non-natural parents seeking custody of a child must usually prove by a preponderance of the evidence that the natural parent is unfit.<sup>46</sup> However, surrogacy and same-sex parent law indicate a shift in judicial thought and courts are granting custody to non-natural parents who intended the birth of the child.<sup>47</sup> Therefore, unless Michael Kantaras, as a non-natural parent, is able to use the therapist's testimony to prove by a preponderance of the evidence that Linda Kantaras is unfit, Linda will most likely receive cus-

<sup>42</sup> Annamay T. Sheppard, *Lesbian Mothers II: Long Night's Journey Into Day*, in REPRODUCTION, SEXUALITY, AND THE FAMILY 27, 36 (Karen J. Maschke ed., 1997).

<sup>43</sup> *Id.* (discussing how the unpredictable decision-setting in child custody hearings is risky for a lesbian parent).

<sup>44</sup> Cheryl Buehler & Jean M. Gerard, *Divorce Law in the United States: A Focus on Child Custody*, 44 FAM. REL. 439, 440 (1995). See also *Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 1, 2 (2001). For example, Arizona, Florida, Georgia, Kansas and Virginia all cite a strong preference for awarding custody to a natural parent instead of third parties. See *Le Roy v. Odgers*, 503 P.2d 975, 977 (Ariz. Ct. App. 1972) (holding that parental custody of children is "both a natural and a legal right"); *Daugharty v. Daugharty*, 571 So. 2d 85, 86 (Fla. Dist. Ct. App. 1990) (holding that the rights of parents are paramount); *Conroy v. Jones*, 232 S.E.2d 917, 918 (Ga. 1977) (holding that a natural parent can only lose custody if he is found to be unfit); *Irwin v. Irwin*, 505 P.2d 634, 640 (Kan. 1973) (enforcing the parental right doctrine); and *Judd v. Van Horn*, 81 S.E.2d 432, 436 (Va. 1954) (stating that the best interests of the child "[are] subject to the condition that a fit parent with a suitable home has a right to the custody of his child superior to the rights of others").

<sup>45</sup> See Buehler & Gerard, *supra* note 44, at 444. See also *Principles of the Law of Family Dissolution*, *supra* note 44, at 2.

<sup>46</sup> Buehler & Gerard, *supra* note 44, at 444. See also *Principles of the Law of Family Dissolution*, *supra* note 44, at 2.

<sup>47</sup> *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) *cert. denied*, 510 U.S. 874 (1993) (awarding custody to a heterosexual couple who intended the birth of the child over the biological surrogate mother); *Southfox v. Southfox*, No. D453867 (Cal. Super. Ct. Jan. 19, 2000) (holding that two lesbian partners were the parents of a child genetically related to one of them); *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1322 (Pa. Super. Ct. 1996) (holding mother's former same-sex partner had standing to seek partial custody of the child because she stood *in loco parentis* to the child); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435-36 (Wis. 1995) (holding same-sex partner can seek visitation if she proves she has a parent-like relationship with the child and the biological parent has interfered substantially with that relationship). But see *Lynda A.H. v. Diane T.O.*, 673 N.Y.S.2d 989, 991 (N.Y. App. Div. 1998) (holding same-sex partner lacked standing to seek visitation with former partner's biological child).



tody of the first child, Matthew. However, the fate of the second Kantaras child is yet to be determined since Michael, although not the natural parent, intended the birth of Irina.

The purpose of this Note is not to analyze the natural parent presumption, nor is it to analyze the new case law surrounding surrogacy and same-sex parents. However, such background information is needed to understand the information discussed herein. The purpose is to discuss the application of the best interests of the child standard in a situation either involving a transgendered natural parent of the child at issue or involving a transgendered intentional non-natural parent of the child at issue.

In the absence of a private child custody agreement, and sometimes even where there is an agreement, the courts will often intervene in child custody issues.<sup>48</sup> In such situations the court will apply, with the intention of protecting the child's psychological and physical well-being, the "best interest of the child" (BIOC) standard to determine the parental rights and responsibilities of each parent.<sup>49</sup> In determining what is in the best interests of the child, courts often employ court-appointed investigators and experts who interview the parents and children.<sup>50</sup>

The Uniform Marriage and Divorce Act<sup>51</sup> (UMDA), presented by the Commissioners on Uniform State Laws, provides the following factors as a guideline to determine the child's best interests:

- (a) the wishes of the child's parent or parents as to his/her custody;
- (b) the wishes of the child as to his/her custodian;
- (c) the interaction and interrelationship of the child with his/her parent or parents, his/her siblings, and any other person who may significantly affect the child's best interest;
- (d) the child's adjustment to his or her home, school, and community; and

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<sup>48</sup> GOLDSTEIN ET AL., *supra* note 40, at 5.

<sup>49</sup> *Id.* See also *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOLOGIST 677 (1994). Most states actually prefer joint legal and physical custody. In the absence of a situation conducive to joint custody, states apply the BIOC standard. See Mary Ann Mason et al., *Family Law for Changing Families in the New Millennium*, in HANDBOOK OF CONTEMPORARY FAMILIES: CONSIDERING THE PAST, CONTEMPLATING THE FUTURE 432, 436 (Marilyn Coleman & Lawrence H. Ganong eds., 2004).

<sup>50</sup> Sheppard, *supra* note 42, at 36.

<sup>51</sup> UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 282 (1998).

(e) the mental and physical health of all individuals involved.<sup>52</sup>

The court shall not consider conduct of a parent that does not affect his relationship to the child.<sup>53</sup> All fifty states have included either portions or the entirety of the UMDA's BIOC standard in their statutes or through case law.<sup>54</sup> However, there is a lack of consensus among legal, judicial, and mental health communities regarding a child's best interests and courts have considerable discretion to make case-by-case decisions.<sup>55</sup>

The BIOC standard is often criticized because the vast discretion provided to the judge allows bias to enter the judgment.<sup>56</sup> Wide discretion and little oversight allow judges to use their individual subjective attitudes about parent behaviors and choices to resolve custody disputes.<sup>57</sup> For instance, if a judge determines that factors such as a parent's religion, lifestyle preferences, gender, or race are important to a child's welfare, such factors may be used to determine a parent's custody award.<sup>58</sup> In fact, a preference for a "traditional lifestyle" and the parent who can provide such a lifestyle is one of the main factors used to determine the best interests of the child.<sup>59</sup> Typically, the inclusion of such factors in the application of the BIOC standard "usually reflect[s] prejudice rather than a rational assessment of the child's welfare."<sup>60</sup>

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<sup>52</sup> Buehler & Gerard, *supra* note 44, at 439; UNIF. MARRIAGE & DIVORCE ACT § 402.

<sup>53</sup> Buehler & Gerard, *supra* note 44, at 439.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (stating that the BIOC standard allows for individualized decision and great judicial discretion).

<sup>56</sup> *Principles of the Law of Family Dissolution*, *supra* note 44, at 2 (providing an overview of the law governing child custody determinations).

<sup>57</sup> Mark Strasser, *Fit to be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U.L. REV. 841, 843 (1997).

<sup>58</sup> Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 616 (1992). See also *Principles of the Law of Family Dissolution*, *supra* note 44, at 2.

<sup>59</sup> Susan Beth Jacobs, *The Hidden Gender Bias Behind "The Best Interest of the Child" Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 868 (1997).

<sup>60</sup> *Principles of the Law of Family Dissolution*, *supra* note 44, at 11.

### III. TRANSGENDERS AND CHILD CUSTODY

#### A. Definition of Transgender

Transgender-related topics often begin with a debate about the definition of sex versus gender and whether such characteristics are immutable or can be changed.<sup>61</sup> The term “sex” is often used by social scientists to refer to the anatomical or biological female or male characteristics.<sup>62</sup> On the other hand, “gender” refers to the characteristics that culture associates with a male or female.<sup>63</sup>

The concepts of transgenderism and transsexuality were not widely known in the United States until after World War II.<sup>64</sup> Regardless of its beginnings, the definition of what constitutes a transgender and the reasoning behind the concept is greatly debated both within and among the medical, academic, psychological, and activist professions; not to mention the differences between individual transgender experiences.<sup>65</sup>

In general, the transgender definition<sup>66</sup> includes “transsexual people (who may or may not pursue medical treatments to change their bodies), cross-dressers, ‘drag queens,’ ‘drag kings,’ and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical.”<sup>67</sup> A person’s identification of himself or herself as a male or female is their gender

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<sup>61</sup> For a full discussion on this topic see Briana Lynn Morgan, Note, *The Use of Rules and Standards to Define a Transsexual’s Sex for the Purpose of Marriage: An Argument for a Hybrid Approach*, 55 HASTINGS L.J. 1329 (2004).

<sup>62</sup> Jamison Green, *Introduction* to PAISLEY CURRAH & SHANNON MINTER, *TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS* 1, 2 (2000), available at <http://www.thetaskforce.org/downloads/transeq.pdf> (distinguishing the terms “sex” and “gender”).

<sup>63</sup> *Id.*

<sup>64</sup> Walter L. Williams, *Transsexuals, Transvestites, Transgender People, and Cross-Dressers*, in 3 *ENCYCLOPEDIA OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER HISTORY IN AMERICA* 203, 203 (Marc Stein ed., 2004) (discussing how transsexuality surgery and research began in Europe).

<sup>65</sup> *Id.*

<sup>66</sup> The terms “transgender” and “transsexual” will be used interchangeably throughout this Note to refer to a person who identifies himself as a transgender.

<sup>67</sup> JASON CIANCOTTO & SEAN CAHILL, *THE POL’Y INST. OF THE NAT’L GAY AND LESBIAN TASK FORCE, EDUCATION POLICY: ISSUES AFFECTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH* 12 (2003), available at <http://www.thetaskforce.org/downloads/EducationPolicy.pdf>. See also VIVIANE K. NAMASTE, *INVISIBLE LIVES: THE ERASURE OF TRANSEXUAL AND TRANSGENDERED PEOPLE* 1 (2000) (defining a transgender as an “individual[] whose gendered self-presentation (evidenced through dress, mannerisms, and even physiology) does not correspond to the behaviors habitually associated with the members of their biological sex.”).

identity.<sup>68</sup> Gender expression refers to how a person expresses their gender identity, through behavior, clothing, or appearance.<sup>69</sup> Transgenders “include those who identify with the gender opposite their birth sex.”<sup>70</sup> Female-to-male transgenders (FTM) are born with female bodies but identify with the male gender, whereas male-to-female transgenders (MTF) are born with male bodies but identify with the female gender.<sup>71</sup>

A major debate surrounding the transgender definition is whether it includes only people who obtain sex reassignment surgery or hormones or whether such a definition includes men or women who identify themselves as the gender opposite that which they were born.<sup>72</sup> The surgical procedure involved in a male-to-female sex-reassignment surgery includes removal of the penis, creation of an artificial vagina by turning the penis inside out, and rerouting of the urethra.<sup>73</sup> The female-to-male sex-reassignment surgery involves a number of surgeries, including phalloplasty (construction of a penis), mastectomy, and hysterectomy.<sup>74</sup> Due to the number of surgeries and resulting difficulties involved in the female-to-male sex-reassignment surgery, many opt for a phalloscrotal prosthesis or an elongated clitoris, which results from taking hormones.<sup>75</sup>

The number of transgenders residing in the United States is uncertain.<sup>76</sup> One estimate placed the number of postoperative transsexuals in the United States as potentially three to nine million.<sup>77</sup> If non-surgical and cross-dressing individuals are added to the definition of

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<sup>68</sup> CIANCOTTO & CAHILL, *supra* note 67, at 12. The terms “gender dysphoria,” “gender identity,” and “transgenderism” will be used interchangeably throughout this Note to refer to a person’s identification with the gender opposite that which he was born.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Green, *supra* note 62, at 3.

<sup>72</sup> CIANCOTTO & CAHILL, *supra* note 67, at 12; GORDENE OLGA MACKENZIE, *TRANSGENDER NATION* 16 (1994). The long-term effects of the hormonal treatments are currently unknown. Tarynn M. Witten et al., *Transgender and Transsexuality*, in 1 *ENCYCLOPEDIA OF SEX AND GENDER: MEN AND WOMEN IN THE WORLD’S CULTURES* 216, 227 (Carol R. Ember & Melvin Ember eds., 2004).

<sup>73</sup> MACKENZIE, *supra* note 72, at 17-18 (also describing a number of additionally requested surgeries intended to change the male’s outward appearance to that of a female, including breast enlargement and face surgery).

<sup>74</sup> *Id.* at 18 (noting that surgically constructed penises are usually “dysfunctional in both urinary and sexual terms”).

<sup>75</sup> *Id.* at 20.

<sup>76</sup> *Id.* at 16-17 (citing unreliable data regarding the number of sex reassignment surgeries, operations in foreign countries, and private surgeries as reasons for the discrepancy).

<sup>77</sup> Witten, *supra* note 72, at 219.

transgender, the above estimate rises to approximately twenty million people.<sup>78</sup>

A debate residing in the medical profession is whether transgenderism is a mental disorder.<sup>79</sup> The DSM IV-TR classifies a "transgendered or transsexual" person as having a psychiatric disorder, given the name gender identity disorder (GID).<sup>80</sup> However, there are no known biological or medical reasons or social causes for the disorder.<sup>81</sup>

## B. History of Transgenders and Child Custody

The path to a child custody issue involving a transgender involves a number of legal steps, all of which are not consistently treated in state legislatures or courts.<sup>82</sup> Most states have yet to decide what makes someone "legally" a male or a female.<sup>83</sup> Transgenders can enter a marriage in one of two ways: (1) they can be in a legal, heterosexual marriage prior to their gender identity change or (2) they can identify themselves as a transgender and subsequently enter a marriage.<sup>84</sup> Regardless of the beginnings, a transgender marital relationship can involve children either through a biological tie with one parent, assisted reproductive technologies, adoption, or surrogacy.

<sup>78</sup> *Id.*

<sup>79</sup> MACKENZIE, *supra* note 72, at 78 (discussing how doctors view a transgender's mental disorder as treatable by surgical techniques but not psychotherapy).

<sup>80</sup> Witten, *supra* note 72, at 220-21. Witten also mentions that there is a movement to remove GID from the DSM. *Id.* For the full diagnostic criteria for gender identity disorder, see AM. PSYCHIATRIC ASS'N, DIAGNOSTIC STAT. MANUAL OF MENTAL DISORDERS IV-TR 536 (2003).

<sup>81</sup> Witten, *supra* note 72, at 220.

<sup>82</sup> See Elizabeth C. Barcena, *Will Sex Prevail Over the Best Interest of the Child?*, 11 BUFF. WOMEN'S L.J. 9, 14 (2003).

<sup>83</sup> Only a few courts have ruled on the validity of transgender marriages. The main issue in such cases is whether the state recognizes the individual's reassigned sex. For the purposes of marriage, courts have recognized the individual's reassigned sex. See, e.g., *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (upholding validity of a marriage involving a transgender woman who underwent sex reassignment surgery). However, other courts have ruled that a person's legal sex is irrevocably determined at birth. See, e.g., *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002) (ruling that the marriage between a male-to-female transgender and her deceased husband was invalid even though the sex reassignment surgery occurred years before the marriage).

<sup>84</sup> See Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 597 n.9 (2004) (discussing the different ways in which a transgender can enter a marriage).

Unfortunately, statistics show that many transgender marriages end in divorce.<sup>85</sup> Historically, transgender marriage dissolutions have resulted in either complete denial of the transgendered parent's custody and visitation with the children or supervised visitation rights for the transgendered parent.<sup>86</sup>

Some courts have shown blatant prejudice towards transgenders in denying child custody. In *In re Darnell*, a mother's parental rights were terminated because of her continuing relationship with her former husband, a male-to-female transsexual, whose parental rights had already been terminated.<sup>87</sup> In its opinion the court cited a case holding that parental rights may be terminated when the custodial parent does not leave an abusive partner.<sup>88</sup> However, the case at hand presented no evidence that the transgender parent was abusive.<sup>89</sup>

A number of social science arguments have been used to prevent a transgender from obtaining custody of a child with whom they have developed a parental relationship. Courts have allowed testimony that a child's understanding about sexuality might be negatively affected by continued contact with the transgender parent.<sup>90</sup> Courts have also entertained the idea that a child's mental and emotional health will be affected by trouble in understanding the transgender parent's transition, the disturbance to their relationship with their transgender parent, and conflicts in the relationship between their parents.<sup>91</sup> In *Cisek v. Cisek*, an Ohio Appeals Court denied visitation rights to a father who decided to undergo sex reassignment after the divorce.<sup>92</sup> In support of its decision, the court cited medical testimony that the children might experience mental harm and difficulty in adjusting their relationship with their father.<sup>93</sup> In *J.L.S. v. D.K.S.*, the court reversed an order of

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<sup>85</sup> Phyllis Randolph Frye, *Facing Discrimination, Organizing for Freedom: The Transgender Community*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 451, 454 (John D'Emilio et al. eds., 1st ed. 2000).

<sup>86</sup> *Id.* at 455; CHOICE USA, *CROSSING THE LINES: REPRODUCTIVE RIGHTS AS A QUEER ISSUE* 2 (2003), available at <http://www.choiceusa.org/facts/lgbt.pdf>.

<sup>87</sup> 619 P.2d 1349, 1352-53 (Or. Ct. App. 1980).

<sup>88</sup> *Id.* at 1352 n.4 (citing *State ex rel. Juvenile Dep't v. East*, 589 P.2d 744 (Or. Ct. App. 1979)).

<sup>89</sup> *Id.*

<sup>90</sup> David Freedman et al., *Children and Adolescents with Transsexual Parents Referred to a Specialist Gender Identity Development Service: A Brief Report of Key Developmental Features*, 7 *CLINICAL CHILD PSYCHOL. & PSYCHIATRY* 423, 424 (2002).

<sup>91</sup> *Id.*

<sup>92</sup> No. 80 C.A. 113, 1982 Ohio App. LEXIS 13335, at \*3 (7th App. July 20, 1982).

<sup>93</sup> *Id.* at \*4.

joint custody after the father pursued gender reassignment surgery.<sup>94</sup> The court refused any visitation until "the children . . . [were] emotionally and mentally suited for physical contact with their father. . . ."<sup>95</sup>

There is also a fear that a child's peer relationships may be adversely affected through the stigma attached to the transgender parent. In *Daly v. Daly*, the Nevada Supreme Court, over a strong dissent, upheld the termination of a natural father's parental rights after he underwent sex reassignment surgery.<sup>96</sup> The court's decision was based on the effect his identity had on his daughter.<sup>97</sup> Evidence was provided that his ten-year-old daughter was extremely upset by her father becoming a woman, telling the court that she did not want to visit him.<sup>98</sup> In a parting shot, the court asserted that "[i]t was strictly Tim Daly's choice to discard his fatherhood. . . ."<sup>99</sup> Upon review of this case, John M. Ohle stated that although a child may not be able to accept their parent's transgender way of life and will most likely receive some social prejudice on behalf of the transgender parent, "never have courts ruled that a social animus is sufficient justification to terminate parental rights."<sup>100</sup>

Some courts have granted transgender parents custody and visitation rights upon the condition that the transgender repress their gender identity issues and keep them secret from the children. In *In re Marriage of D.F.D. and D.G.D.*, a father who had cross-dressed, but who was in therapy and whose child was unaware of the cross-dressing, won a reversal of a trial court decision granting sole custody to the mother and only supervised visitation to the father.<sup>101</sup>

Although courts have typically viewed a transgender parent as a threat to a child's best interests, some courts have found a transgender as a parent to be non-threatening. In *In re Custody of T.J.*, an appeals court affirmed the decision to award child custody to a male-to-female

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<sup>94</sup> 943 S.W.2d 766, 775 (Mo. Ct. App. 1997).

<sup>95</sup> *Id.* at 773-74.

<sup>96</sup> 715 P.2d 56 (Nev. 1986).

<sup>97</sup> *Id.* at 58 n.4.

<sup>98</sup> *Id.* at 58.

<sup>99</sup> *Id.* at 59.

<sup>100</sup> John M. Ohle, *Constructing the Trannie: Transgender People and the Law*, 8 J. GENDER RACE & JUST. 237, 264 (2004).

<sup>101</sup> 862 P.2d 368, 376-77 (Mont. 1993). *See also* Mayfield v. Mayfield, No. 96AP030032, 1996 WL 489043 (Ohio Ct. App. Aug. 14, 1996) (holding that a father's proclivity to cross-dress does not prevent him from being a loving and capable parent); *In re Welfare of V.H.*, 412 N.W.2d 389 (Minn. Ct. App. 1987); and *P.L.W. v. T.R.W.*, 890 S.W.2d 688 (Mo. Ct. App. 1994) (holding that a father who masturbates in women's clothing is not barred from his parental visitation rights).

transgender.<sup>102</sup> The court reasoned its decision by citing the child's knowledge of and ability to deal with his father's transgender identity.<sup>103</sup> The court stated that there was no evidence that the child had any gender identity confusion of his own and there was no evidence that the transgender parent would provide future issues for the child.<sup>104</sup> Similarly, in *Christian v. Randall*, the court denied a father's attempt to regain custody from a former wife who had become a male because the children were happy and well-adjusted.<sup>105</sup> In making its decision, the court relied on a Colorado statute that precludes the court's consideration of "conduct . . . that does not affect [the parent's] relationship with the child."<sup>106</sup>

### C. Scientific Evidence

There are no available statistics regarding how many children in the United States have a transgender parent.<sup>107</sup> However, recent statistics estimate that up to one-third of the transgenders attending a gender identity clinic have children.<sup>108</sup> The amount of published research examining the social and psychological development of children of transgender parents is astoundingly small. However, the little data that exists shows that children of transgender parents are not negatively impacted by their parent's gender dysphoria.<sup>109</sup>

In 1978, a study was conducted regarding the sexual identity of thirty-seven children raised by homosexual or transsexual parents.<sup>110</sup> The children ranged in age from three to twenty years and lived in the sexually atypical households for one to sixteen years. Thirty-six of the children report or recall childhood toys, games, clothing, and peer group preferences that are typical for their sex. The thirteen older children who reported erotic fantasies or overt sexual behaviors were all heterosexually oriented. The same author of the 1978 study published a similar study in 1998,<sup>111</sup> which concluded that children of transgender parents are "more likely to be hurt by a traumatic

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<sup>102</sup> No. C2-87-1786, 1988 WL 8302, at \*3-4 (Minn. App. Feb. 9, 1988).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> 516 P.2d 132, 133 (Colo. Ct. App. 1973).

<sup>106</sup> *Id.* at 134.

<sup>107</sup> CIANCOTTO & CAHILL, *supra* note 67, at 28.

<sup>108</sup> Freedman et al., *supra* note 90, at 424.

<sup>109</sup> CIANCOTTO & CAHILL, *supra* note 67, at 21-22.

<sup>110</sup> Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692 (1978).

<sup>111</sup> Green, *supra* note 1.



separation from their parent than because of that parent's gender identity."<sup>112</sup>

A separate investigation was conducted in the United Kingdom in 2002 to examine whether and how parental gender role influences children's gender development, mental health, family relationship and peer relationships.<sup>113</sup> The data collected from the investigation repeated the conclusion of the 1978 study and reported that none of the children developed any characteristics of their own gender identity disorder.<sup>114</sup> The authors of the 2002 report compared their results with those of the 1978 report and stated that:

Both audits clearly indicated that having a member of the family with gender identity concerns presented a challenge to family relationships, with both children of transsexual parents and children with their own gender identity concerns recording high levels of parent-child relationship problems. The case notes of children of transsexual parents also revealed high levels of conflict between their parents. However, the children of transsexual parents did not record high levels of depression or misery.<sup>115</sup>

The authors of the 2002 report also report similarities between the feelings of loss and disruption of a child of a transgender parent and those of children experiencing other familial losses or disruptions, such as the separation of parents, a new partner of a parent, or the prolonged illness or medical treatment of a parent.<sup>116</sup> Both the 1978 study and the 2002 report suggest that children of transgender parents are likely to experience difficulties in the familial relationship. However, nothing in either study indicates that these difficulties are much different from other, similar difficulties that children of non-transgender parents experience while growing up.

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<sup>112</sup> CIANCOTTO & CAHILL, *supra* note 67, at 22.

<sup>113</sup> Freedman et al., *supra* note 90, at 423.

*Id.* at 428-29.

<sup>115</sup> *Id.* at 429.

<sup>116</sup> *Id.* at 430.

#### IV. THE USE OF RACE, SEXUAL ORIENTATION AND RELIGION AS FACTORS IN ADOPTION AND CUSTODY DECISIONS

The American Law Institute (ALI) prohibits custody decisions based on "race, ethnicity, sex,<sup>117</sup> religion, sexual orientation, extramarital sexual conduct,<sup>118</sup> or the parents' financial circumstances,<sup>119</sup> except in very limited circumstances."<sup>120</sup> However, the legal system has historically employed the presence of such immutable characteristics to deny adoptions and refuse custody claims. In many of these cases courts apply a "nexus test," under which some of the above listed factors are relevant to a custody decision only if they have adversely affected the child's well-being or it is likely that the factor will adversely affect the child in the future.<sup>121</sup> Unfortunately, the malleability of the BIOC standard has allowed some judges to inject their ideological views into custody decisions.<sup>122</sup> In many of these decisions, besides the presence of the undesirable characteristic, the denied parent was fit.

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<sup>117</sup> For nearly a century, courts decided child custody issues with a presumption in favor of the child's mother. However, by 1990 this presumption was either eliminated or downgraded to a factor used in the BIOC standard. Mason et al., *supra* note 49, at 436. See also *Ex parte Devine*, 398 So. 2d 686, 695-96 (Ala. 1981) (holding that a presumption in favor of maternal custody for children of "tender years" unconstitutionally discriminates on the basis of sex).

<sup>118</sup> A discreet extramarital affair will normally not be a consideration in determining custody. However, it will become a factor if the relationship represents a threat, has harmful sexual overtones, or puts the child in embarrassing situations.

<sup>119</sup> Note that Michael Kantaras's ability to provide for the financial security of the children was a primary focus of the court. *Kantaras v. Kantaras*, No. 98-5375CA, at 158 (Fla. Cir. Ct. Feb. 21, 2003), available at <http://www.court tv.com/archive/trials/kantaras/docs/opinion.pdf>, *rev'd*, 884 So.2d 155 (Fla. Dist. Ct. App. 2004).

<sup>120</sup> PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.12 (2002).

<sup>121</sup> Helen Y. Chang, *My Father is a Woman, Oh No!: The Failure of the Courts to Uphold Individual Substantive Due Process Rights for Transgender Parents Under the Guise of the Best Interest of the Child*, 43 SANTA CLARA L. REV. 649, 685 (2003) (arguing that a parent's gender change should be used as merely one factor in determining custody and visitation arrangements).

<sup>122</sup> James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 927 (discussing that although courts should treat sexual activity and sexual orientation within the nexus test, judges are "tempted to manipulate the rule to whatever end their ideological viewpoint inclines them").

Race and gender are immutable characteristics with which a person is born and cannot change.<sup>123</sup> However, the classification of sexual orientation and religion are not as transparent. Courts have debated whether sexual orientation is immutable or whether a person chooses to engage in homosexual conduct.<sup>124</sup> Similarly, courts often believe that religion is a subject of experience and choice and can be changed.<sup>125</sup> The immutability of a person's gender identity can similarly be debated.<sup>126</sup> A significant portion of the population identifies with the gender with which they are born, but transgenders do not identify with their assigned gender.<sup>127</sup> However, the amount of control a transgender has in acting upon their opposite gender identity is debated.<sup>128</sup> It is for these reasons that it is useful to consider judicial treatment of both immutable and changeable characteristics in adoption and child custody decisions.

Although courts have used immutable characteristics to deny adoptions and custody requests, the past decade has shown a shift in legal thought from intolerance to understanding, if not acceptance. Courts are no longer viewing gay lifestyles or the presence of a parent of a different race as negative per se to the adoption or custody of a child.<sup>129</sup> Such progressive decisions are possible because courts are

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<sup>123</sup> Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U.J. INT'L L. & POL'Y 1, 10 (1996).

<sup>124</sup> Julie A. Baird, *Playing it Straight: An Analysis of Current Legal Protections to Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 BERKELEY WOMEN'S L.J. 31, 65 (2002). This debate is often structured with proponents of gay rights arguing that sexual preference is a suspect classification and the opposition claiming morality reasons for denial. Ann M. Reding, Note, *Lofton v. Kearney: Equal Protection Mandates Equal Adoption Rights*, 36 U.C. DAVIS L. REV. 1285, 1295 (2003).

<sup>125</sup> See James W. Gilliam, Jr., *Toward Providing a Welcoming Home for All: Enacting a New Approach to Address the Longstanding Problems Lesbian, Gay, Bisexual, and Transgender Youth Face in the Foster Care System*, 37 LOY. L.A. L. REV. 1037, 1061 (2004) (comparing religious preferences to sexual orientation).

<sup>126</sup> Phyllis Randolph Frye, *The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They are Allowed to Wear on the Job, Which Restroom They are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 199 (2000).

<sup>127</sup> CIANCOTTO & CAHILL, *supra* note 67, at 12.

<sup>128</sup> John Alan Cohan, *Parental Duties and the Right of Homosexual Minors to Refuse "Reparative" Therapy*, 11 BUFF. WOMEN'S L.J. 67, 73 (2002/2003) (discussing whether transgenders are born into their sexual preference).

<sup>129</sup> See *J.B.F. v. J.M.F.*, 730 So. 2d 1186, 1189 (Ala. Civ. App. 1997) (holding that custody should be determined on the parent's individual character and parenting skills, and not on his or her sexual preference), *rev'd*, 730 So. 2d 1190 (Ala. 1998).

engaging in full factual analyses of each individual case to find whether the parent or parental candidate is able to meet the physical, mental and emotional needs of each individual child in question. The following sections provide an overview of the transformation of legal usage of such immutable characteristics in relation to adoption and child custody decisions.

#### A. Race Cannot Be Used to Reflect Bias

In 1984, the U.S. Supreme Court decided *Palmore v. Sidoti*, a race-based case, ruling that, although the best interests of the child might require taking the race of the parents into account, the usage of such a factor indicates societal prejudice and is impermissible.<sup>130</sup> The state argued that a child with parents of a different race was likely to suffer social stigmatization.<sup>131</sup> The Court saw a problem in basing the custody order on the "risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin."<sup>132</sup> As such, the Court refused to consider private biases as a reason to deny custody.<sup>133</sup>

Similarly, in 1994, Congress passed the Multiethnic Placement Act,<sup>134</sup> which prevents adoption or foster care agencies receiving federal assistance from delaying or denying an adoptive placement solely on the basis of race. Agencies may use race as "one of a number of factors used to determine the best interests of a child."<sup>135</sup>

Therefore, both the Supreme Court and the legislature have decided that race may be used as a factor in determining both adoption and child custody decisions as long as the use is restricted to actual impact. Such decisions must reflect the optimal situation for the child and are not permitted to reflect the personal bias of the judge or anyone else involved in the decision.

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<sup>130</sup> *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984). See also Rayside, *supra* note 39, at 369-70 (discussing the link of *Palmore* to gay and lesbian custody claims).

<sup>131</sup> See *Palmore*, 466 U.S. at 433.

<sup>132</sup> *Id.* Although the rule from *Palmore* extinguished the use of race as a determinative factor in child custody decisions, debate regarding transracial adoptions thrives. See Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967, 983 (2003); and Donna B. McElroy, *The Consideration of Race in Child Placement: Does It Serve the Best Interests of Black and Biracial Children?*, 2 MARGINS 231, 254 (2002).

<sup>133</sup> See *Palmore*, 466 U.S. at 433.

<sup>134</sup> 42 U.S.C. § 5115a (1994).

<sup>135</sup> 42 U.S.C. § 5115a(a)(2).

## B. Courts May Use Religion if Evidence of Harm to the Child

The legal system affords a great amount of judicial respect toward the religious beliefs of either party involved in a child custody dispute.<sup>136</sup> In fact, some state legislatures allow children to be matched with adoptive families of the same religion.<sup>137</sup> However, a parent's religion is not normally a factor in deciding custody unless there is evidence of potential or present harm to the child.<sup>138</sup> Examples of situations where the court will view religion as a factor include where the parent engages in unusual "cult" activities or has an unorthodox lifestyle that is likely to put the child in danger or be detrimental to the best interest of the child.<sup>139</sup> However, some evidence does exist that courts favor the parent thought to provide a more religious upbringing.<sup>140</sup> In summary, unless evidence exists that the child will be harmed by the parent's religion, courts will not usually consider religion a factor in determining the most favorable custodial arrangement for the child.<sup>141</sup>

## C. Sexual Orientation May be Considered if it Affects the Child Directly

Another instructive analogy to the issue of transgender custody can be drawn from the treatment of sexual orientation in adoptions and child custody disputes. Courts are permitted to consider a parent's homosexuality when awarding custody or visitation, but only as it may directly affect the child.<sup>142</sup> Other corollary situations related to

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<sup>136</sup> Bruce MacDougall, *The Legally Queer Child*, 49 MCGILL L.J. 1057, 1079 (2004) (discussing the deference given to religion in child custody suits involving a homosexual parent).

<sup>137</sup> Arkansas, Minnesota and California are among the states allowing a religious match in adoptions. See Gilliam, *supra* note 125, at 1060-61.

<sup>138</sup> Jennifer Ann Drobac, Note, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1619 (1998). Some courts view a parent's religion as a proper consideration under the morality inquiry of the BIOC standard. Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383, 397 (1989) (noting the consensus among courts to consider moral and spiritual welfare for the best interest of the child).

<sup>139</sup> See Drobac, *supra* note 138, at 1619.

<sup>140</sup> See, e.g., *Crowson v. Crowson*, 742 So. 2d 107, 112 (La. Ct. App. 1999) (upholding award of custody based in large part on fact that father "provided the most, if not only, exposure to church and religion").

<sup>141</sup> Beschle, *supra* note 138, at 399.

<sup>142</sup> See *Mohrman v. Mohrman*, 565 N.E.2d 1283, 1285 (Ohio Ct. App. 1989) (refusing to consider mother's lesbian relationship in appeal of custody denial, but upholding based on her alcoholism); and *M.J.P. v. J.G.P.*, 640 P.2d 966, 968 (Okla.

homosexuality in general, e.g., the community's negative feelings toward a parent's homosexuality, may not be considered when awarding custody.<sup>143</sup> One would presume this relatively judicious application of law would be applicable to other sexual minorities as well.

These decisions provide hope for the transgender parent because a person's gender dysphoria is just as inherent as a person's sexual preference.<sup>144</sup> If inherent characteristics like sexual preference are not used to determine whether a person is fit to form a parental relationship with a child, the same argument should be used to exclude the use of a person's transgender status to deny the continuance of a parental relationship that has already formed. "[Transgender] parents relate to their children as parents, not as [transgenders]."<sup>145</sup> Thus, if a transgender is able to provide for a child's physical, emotional, and mental needs, the transgender should be considered for the role of custodial parent, regardless of his or her gender identity.

### 1. Almost Every State Allows for Same-Sex Adoption

Throughout the United States, a number of courts and administrative agencies have ruled that a person's sexual preference does not play a role in determining whether they are fit to adopt a child.<sup>146</sup> In fact, twenty-one states and the District of Columbia have state laws and policies that expressly ban discrimination against gay or lesbian parents in custody or visitation disputes.<sup>147</sup> In 1995, second parent

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1982) (ruling that the "determining factor should be the effect the homosexual relationship has on the child and if found to be detrimental to the child's well-being or an impairment to his emotional or physical health. . . .").

<sup>143</sup> See *S.N.E. v. R.L.B.*, 699 P.2d 875, 878-79 (Alaska 1985) (ruling that "it is impermissible to rely on any real or imagined social stigma attaching to Mother's status as a lesbian"). But see *Dailey v. Dailey*, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981) (court was persuaded by an expert who testified that the child would be damaged by the peer pressure and social stigma associated with homosexuality).

<sup>144</sup> The immutability of gender identity has been heavily debated. See *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000) (holding that a female identity in homosexual men with female tendencies is immutable because it is inherent in their identities). But see *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. App. 1999) (refusing to view gender identity as immutable).

<sup>145</sup> Eileen P. Huff, Student Comment, *The Children of Homosexual Parents: The Voices the Courts Have Yet to Hear*, 9 AM. U. J. GENDER SOC. POL'Y & L. 695, 696 (2001).

<sup>146</sup> Hastings Wyman, *New GLBT Political and Policy Developments: Five Years of Progress*, in *HANDBOOK OF GAY, LESBIAN, BISEXUAL, AND TRANSGENDER ADMINISTRATION AND POLICY* 91, 117 (Wallace Swan ed., 2004).

<sup>147</sup> *Id.* (also stating that Alabama, North Carolina, and Utah have the worst records for such policies).

adoption was legislatively recognized in Vermont; Connecticut passed similar legislation in 2000.<sup>148</sup>

As long as the procedural requirements of the pertinent adoption statutes are met, almost every state allows same-sex couples to adopt children.<sup>149</sup> Jurisdictions where adoption is not determined by a parent's sexual orientation have indicated that if a child is already adjusted and living with the same-sex couple, removal from the living situation would be traumatic and not in the child's best interest.<sup>150</sup> In Vermont's seminal same-sex adoption case, *Adoption of B.L.V.B.*, the court stated that "[s]ocial fragmentation and the myriad configurations of modern families have presented us with new problems and complexities that cannot be solved by idealizing the past. Today a child who receives proper nutrition, adequate schooling and supportive sustaining shelter is among the fortunate, whatever the source."<sup>151</sup>

Additionally, a number of professional organizations, including the American Academy of Pediatrics (AAP), the National Association of Social Workers, and the American Psychological Association (APA), have "recognize[d] that gay and lesbian parents are just as good as heterosexual parents, and that children thrive in gay- and lesbian-headed families."<sup>152</sup> In February 2002, the AAP released a Policy Statement entitled *Coparent or Second-Parent Adoption by Same-Sex Parents* encouraging members to "[a]dvocate for initiatives that establish permanency through coparent or second-parent adoption for children of same-sex partners."<sup>153</sup> Denise Lieberman, Legal Director of the American Civil Liberties Union of Eastern Missouri believed the AAP's statement signified its belief that "same sex couples can raise kids just as well as straight couples. A judge [will]

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<sup>148</sup> Rayside, *supra* note 39, at 370.

<sup>149</sup> Eleanor Michael, Note, *Approaching Same-Sex Marriage: How Second Parent Adoption Cases Can Help Courts Achieve the "Best Interests of the Same-Sex Family,"* 36 CONN. L. REV. 1439, 1447 (2004). Florida and Mississippi have laws forbidding adoption by homosexuals. FLA. STAT. ANN. § 63.042(3) (West 2005) (stating, "No person eligible to adopt under this statute may adopt if that person is a homosexual"); MISS. CODE ANN. § 93-17-3 (West 1999) (prohibiting same-sex couples from adopting).

<sup>150</sup> Michael, *supra* note 149, at 1448.

<sup>151</sup> 628 A.2d 1271, 1275 (Vt. 1993) (quoting *In re Evan*, 583 N.Y.S.2d 997, 1002 (N.Y. Sup. Ct. 1992)).

<sup>152</sup> CIANCOTTO & CAHILL, *supra* note 67, at 21.

<sup>153</sup> American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339, 339-40 (2002).

have to find specific grounds about a person to deny him an adoption, not just that he's gay."<sup>154</sup>

## 2. States are Progressing Towards the Allowance of Same-Sex Custody

In the 1980s, a number of custody decisions favorable to the gay-lesbian movement required that the custodial parent refrain from any outwardly gay behavior, essentially keeping his or her lifestyles "in the closet."<sup>155</sup> In the 1990s, a number of state appeals courts created a categorical exclusion that shielded children from any exposure to homosexual behavior.<sup>156</sup>

Upon reversing a lower court's determination that a mother was unfit for parenting based on her homosexuality, the Massachusetts Supreme Court in *Bezio v. Patenaude* quoted a clinical psychologist's testimony that a parent's sexual preference typically has no detrimental impact on his or her children.<sup>157</sup> Based largely upon studies pointing to the lack of harmful effects to children of lesbian and gay parents, courts have begun to view a parent's sexual preference as a non-factor in child custody disputes.<sup>158</sup> In *T.B. v. L.R.M.*, the Pennsylvania Supreme Court considered whether a non-biological partner could legally obtain custody of a child co-parented between two lesbians.<sup>159</sup> The decision upheld the right of the non-biological partner to seek custody under the "in loco parentis" doctrine (Latin for "in the place of a parent"). In awarding the non-biological partner custody of the child, the court determined that the important consideration in a custody case is whether the person seeking custody has acted as a parent, not what that person's gender identity is.

The above information illustrates that courts are inconsistent in their treatment of sexual orientation as a factor in child custody disputes. Some states treat a parent's sexual orientation as a neutral factor, only denying such rights if the parent's sexual orientation or ac-

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<sup>154</sup> Kenneth Haller, *The American Academy of Pediatrics Coparent or Second-Parent Adoption by Same-Sex Parents Policy Statement: Its Science, Its Implications*, 6 J. GAY & LESBIAN MED. ASS'N 29, 31 (2002).

<sup>155</sup> Rayside, *supra* note 39, at 369-70.

<sup>156</sup> *Id.* at 370.

<sup>157</sup> *Bezio v. Patenaude*, 410 N.E.2d 1207, 1215-16 (Mass. 1980).

<sup>158</sup> Barry M. Parsons, Case Note, *Bottoms v. Bottoms: Erasing the Presumption Favoring a Natural Parent Over Third Parties—What Makes This Mother Unfit?*, 2 GEO. MASON INDEP. L. REV. 457, 458 (1994).

<sup>159</sup> 786 A.2d 913 (Pa. 2001).



tivities are proven to harm the child.<sup>160</sup> However, other states treat a parent's sexual orientation as a reason to deny that parent custody or restrict visitation, regardless of a showing of harm.<sup>161</sup> Reasons for using a parent's sexual orientation as a factor in child custody disputes include arguments that homosexuality is immoral, that unmarried cohabitation is immoral, and that the children will face stigma.<sup>162</sup>

## V. HOW COURTS SHOULD ADDRESS TRANSGENDER PARENTS

### A. The Family Construct in the Best Interests of the Child Has Changed

The definition of family in the United States is a changing concept and a number of family situations exist where non-parents play the parental role in a child's life. Although not currently given priority within the legal system, non-parents have shown that they are capable of raising children in environments that are just as caring and functional as those found in the traditional family.<sup>163</sup> In fact, the American Law Institute's Principles of Law of Family Dissolution has recog-

<sup>160</sup> Phyllis G. Bossin et al., *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 345-46 (2004) (arguing that in discussing custody issues, courts are increasingly viewing sexual orientation as a neutral factor). See, e.g., *In re Marriage of Cabalquinto*, 669 P.2d 886, 888 (Wash. 1983) (court ruled that homosexuality in and of itself is not a bar to custody or to reasonable right of visitation); *A v. A*, 514 P.2d 358, 360 (Or. Ct. App. 1973) (court ruled that the fact that the father is a homosexual is not sufficient for a change of custody without showing an adverse effect on the children's welfare); and *State ex. rel. Human Serv. Dep't.*, 764 P.2d 1327, 1330 (N.M. Ct. App. 1988) (court decided that the child should be placed with his uncle, whose homosexuality had no significant bearing on the best interests of the child).

<sup>161</sup> Bossin et al., *supra* note 160, at 346. See, e.g., *Ex rel J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998) (modifying custody to father and declaring a preference for father's heterosexual marriage to mother's same-sex relationship); and *Taylor v. Taylor*, 47 S.W.3d 222 (Ark. 2001) (affirming a restriction on custody to the mother that allowed the mother custody only if she did not live in a house with her same-sex partner or have the partner as an overnight guest).

<sup>162</sup> For a full discussion on these arguments see Matt Larsen, *Lawrence v. Texas and Family Law: Gay Parents' Constitutional Rights in Child Custody Proceedings*, 60 N.Y.U. ANN. SURV. AM. L. 53, 74-95 (2004).

<sup>163</sup> Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 893 (2000) ("Parenthood . . . is increasingly seen as a functional status, rather than one derived from biology or legal entitlement."). See also *Developments in the Law: IV. Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies* 116 HARV. L. REV. 2052, 2054 (2003).

nized two new categories of parents that address the evolving family: "parent[s] by estoppel" and "de facto" parents.<sup>164</sup> A "parent by estoppel" has "lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent. . . ."<sup>165</sup> A "de facto" parent has resided with the child and, with the consent of the legal parent, performed a share of parental functions.<sup>166</sup>

Regardless of their gender identity, a transgender can be a natural parent or fill the role of either a parent by estoppel or a de facto parent. Therefore, even though the law may not legally recognize a transgender as a parent, biology and familial roles will provide the transgender an opportunity to fill such a role. Thus, whether or not the law wants to legally award child custody to transgenders, family constructs involving transgenders in parental roles will exist.

In situations where a transgender plays the role of a parent, either biologically or socially, the individual is afforded the opportunity to function as a "good parent," the same opportunity given to any parent. As discussed above, state legislatures have used the BIOC standard to describe the characteristics that afford one parent preferred custodial status. Generally, the BIOC standard seeks to evaluate the abilities of a parent to provide for the physical, mental, and emotional needs of the child. Therefore, whichever parent is able to provide the most in relation to the child's needs should be awarded custody of the child.

#### B. Finding Gender Dysphoria an Immutable Characteristic

Dependent upon which side of the debate considered, gender dysphoria is either an immutable disorder that a person is born with or a person's gender identity is something that can be chosen and acted upon at the discretion of the individual. The medical profession views transgenders as having a mental disorder that is treatable in some instances. The legal system should adopt the medical profession's opinion of transgenders and similarly find this disorder an immutable characteristic.

Although the courts are presently inconsistent in treatment of other immutable characteristics, a number of courts are only consider-

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<sup>164</sup> PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (2002). However, the National Conference of Commissioners on Uniform State Laws' new draft of the Uniform Parentage Act provides no recognition of de facto parents, psychological parents or parents by estoppel. See generally UNIF. PARENTAGE ACT, 9B U.L.A. 299 (2000).

<sup>165</sup> PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 164, § 2.03(1)(b)(iii).

<sup>166</sup> *Id.* § 2.03(1)(c).

ing these immutable characteristics in child custody decisions if they truly have an impact on the child's well being. Arguably, courts should approach transgenderism in the same manner, that is, only if the parent's gender dysphoria negatively impacts the child. Therefore, analogous to the treatment of race in child custody and adoption decisions, consideration of a parent's gender dysphoria should not further private biases. Courts should also treat a parent's gender identity similar to the treatment afforded to religion; a parent's transgenderism should only be considered if there is evidence that it is likely to harm the child. Finally, courts should follow the path emerging in sexual orientation adoption and custody decisions by granting transgender parents custody of children if the situation is deemed to be in the best interests of the child.

### C. Scientific Data Shows Little Chance of Harm to Children of Transgender Parents

Family law frequently lags behind social change.<sup>167</sup> Often when an area of family law is antiquated, scientific data aids in the reflection of emerging social constructs.<sup>168</sup> The use of the BIOC standard to deny perfectly fit parents who are also transgenders is an example of a situation where family law has fallen behind social realities. Social science research has confirmed what experience and common sense already suggest: namely, that love, stability, patience, and time to spend with a child are far more critical factors in being a good parent than a person's gender identity. Therefore, if a transgender parent proves his desire and ability to provide for the welfare of a child, the transgender condition in itself should not be a bar to custody.

The presence of empirical data evidencing that a parent's gender dysphoria does not negatively impact a child is essential in continuing courts down the path of appropriately considering a parent's transgenderism only in negative circumstances. However, the presence of this data and its ongoing creation is nowhere near the amount of social data related to the impact of same-sex parents on children. As such, the need for more social science experiments and the documentation of results is paramount to the willingness of courts to properly consider the confusing and often controversial issues related to transgenders.

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<sup>167</sup> Mason et al., *supra* note 49, at 432-33 (discussing how the reasoning in family law legislation and case law is often provided by social science experts).

<sup>168</sup> *Id.*

#### D. The Ultimate Goal is Finding the Parent Who Best Fits the Child's Needs

Unfortunately, courts have historically refused to apply the full BIOC analysis and have used a parent's gender identity to deny custody to the transgender parent. Most of these decisions lacked a negative link between the parent's gender identity and their capacity to be a good parent. This is especially true in those child custody cases where the transgender parent already functioned as a good parent.

Within the sphere of transgender child custody, courts need to become less focused on the definition of the relationship between the parents and more focused on the existence of a positive-functioning relationship between the children and the parent or parental figure. Custody decisions should be granted in favor of the parent proving devotion to the children and the ability to provide a stable family environment. Courts also need to separate the fact of a parent's gender identity from the effect it has on the children involved in the issue. Additionally, courts should attempt to have both parents involved in the child's life rather than terminate a transgender's parental rights. To foster such an attempt, courts should allow the children to go to counseling and allow the transgender parent an attempt to foster a relationship with the child.

### CONCLUSION

Medical and social science fields have long recognized that people may identify with the gender opposite with which they were born. Unfortunately, courts have lagged behind acceptance of this social issue. With the advancement of treatment and therapy options available to transgenders, the presence of transgender parents in child custody disputes will continue to occur. Thus, the legal profession must prepare to face this issue.

Additionally, it does not seem plausible that the standard for determining child custody will change from the BIOC standard. Therefore, the court system must determine ways in which to apply the unique issues presented by the presence of a transgender parent in a child custody dispute. Evaluation of the effect of a parent's gender identity upon a child should be the most important issue involving transgender parents and child custody. Although a small amount of scientific data exists on the topic, that which currently exists points to the conclusion that a transgender parent does not negatively impact most children. As evidenced by the change in courts' attitudes regarding gay and lesbian adoptions and custodial decisions, reliable scientific data is the key to changing the court system's outlook on award-

ing custody of children to transgenders. Additionally, courts must individually consider the facts of each case and honestly appraise a parent's ability to meet the physical, mental, and emotional needs of the child, regardless of their gender identity. Such a process will replace judicial bias towards transgender parents and will ensure that courts justly determine which custody placement is in the best interests of a child.